

used. Accordingly, claimant requests the Board to modify the June 18, 2004 Award by granting him benefits for a 15 percent permanent partial general disability and by increasing his temporary total disability benefits by \$168.25.

Conversely, respondent argues the Board should affirm the Judge's finding of functional impairment. The respondent does not challenge claimant's contention that he has been underpaid temporary total disability benefits.

The only issue before the Board on this appeal is the extent of claimant's functional impairment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and the parties' arguments, the Board finds and concludes the June 18, 2004 Award should be affirmed.

The facts are not in dispute. Claimant injured his back on February 24, 2003, loading metal barrels onto trailers. The parties agreed the accident and resulting back injury arose out of and in the course of claimant's employment with respondent.

As a result of that injury, in July 2003 claimant underwent back surgery, which involved a discectomy of the disc between the fourth and fifth lumbar vertebrae. After recovering from surgery, in December 2003 claimant returned to work for an oil well service company as a laborer earning more than what he earned working for respondent. Consequently, claimant does not request a work disability (a permanent partial general disability greater than the functional impairment rating) in this claim. And claimant's permanent partial general disability will be based upon his permanent whole body functional impairment.¹

Both parties each presented a medical expert witness concerning claimant's permanent functional impairment. Claimant presented the testimony of Dr. Pedro A. Murati, who practices in the areas of physical medicine and rehabilitation, electrodiagnosis, and industrial rehabilitation and who regularly provides independent medical evaluations. Dr. Murati examined claimant in January 2004 and rated claimant as having a 20 percent whole body functional impairment under the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (AMA Guides) (4th ed.). According to Dr. Murati, claimant fell into DRE Lumbosacral Category IV. The doctor explained his rating, in part:

¹ See K.S.A. 44-510e.

If you look at page 101 [of the *AMA Guides*], first column, next-to-last paragraph under No. 6: “If the physician cannot place a patient into an impairment category, or if disagreement exists about which of two or three categories to use for the patient, the physician should use the Range of Motion Model as a differentiator, as explained in Section 3.3b.” And then you look on the next column, second paragraph: “When the Range of Motion Model is used as a differentiator, the permanent percent assigned to the patient under the Injury Model should not be lower than that of the lowest category of the Injury Model in question, nor higher than that of the highest category in question.” This man has had surgery. That in itself is a 10 percent whole person impairment. He also has missing both ankle reflexes with some loss of sensation. That’s at least a 5 percent lower extremity impairment for each side, which translates to 2 percent whole person each side, which combines to 4. You combine the 4 with the 10, that gives you 14 percent whole person impairment. That is without even taking the range of motion measurement. That places him between a Category III and a Category IV. So the guides allow me to place him in either III or a IV. I place him in a IV for 20 percent.²

On cross-examination, Dr. Murati testified that claimant probably did not have a loss of motion segment integrity in his lower spine.

Respondent presented the testimony of Dr. Paul S. Stein, who is a board-certified neurosurgeon. Dr. Stein examined claimant in March 2004 and determined he had sustained a 10 percent whole body functional impairment under the *AMA Guides* (4th ed.). Dr. Stein placed claimant in DRE Lumbosacral Category III. The doctor did not believe claimant fell in Category IV as he interpreted the *Guides* as requiring loss of motion segment integrity.

Judge Clark found Dr. Stein’s opinion regarding claimant’s functional impairment the most persuasive. The Board finds no reason to disturb that finding. The Judge utilized the correct average weekly wage in computing claimant’s temporary total disability benefits. Accordingly, claimant’s request for additional temporary total disability benefits is without merit. The June 18, 2004 Award should be affirmed.

AWARD

WHEREFORE, the Board affirms the June 18, 2004 Award entered by Judge Clark.

IT IS SO ORDERED.

² Murati Depo. at 15-16.

Dated this ____ day of October 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: David H. Farris, Attorney for Claimant
Janell Jenkins Foster, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director